ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062
jmauldin@adamsbroadwell.com

SACRAMENTO OFFICE
520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721
TEL: (916) 444-6201
FAX: (916) 444-6209

DANIEL L. CARDOZO
THOMAS A. ENSLOW
PAMELA N. EPSTEIN
TANYA A. GULESSERIAN
MARC D. JOSEPH
ELIZABETH KLEBANER
RACHAEL E. KOSS
JAMIE L. MAULDIN
ROBYN C. PURCHIA
ELLEN L. TRESCOTT

OF COUNSEL
THOMAS R. ADAMS
ANN BROADWELL

January 11, 2013

VIA US MAIL AND EMAIL:

Fred Harris
Legal Division
California Public Utilities Commission
505 Van Ness Ave., Room 5040
San Francisco, CA 94102-3298
E-mail: fnh@cpuc.ca.gov; jva@cpuc.ca.gov, public.records@cpuc.ca.gov

Re: CUE's Comments on Revised Draft Resolution L-436

Dear Mr. Harris:

Pursuant to the letter to parties extending the deadline for comments on Revised Draft Resolution L-436 to January 11, 2013, the Coalition of California Utility Employees (CUE) submits these comments. The member unions of CUE represent approximately 35,000 employees of most of the electric utilities in California.

I. RESOLUTION L-436 SHOULD KEEP INDIVIDUALLY IDENTIFIABLE INFORMATION OF NON-MANAGEMENT EMPLOYEES IN PERSONNEL FILES CONFIDENTIAL

A utility employee's personnel file contains more than just a name and training history. It may include private information such as spouse's names, birthdays, social security numbers, phone numbers, marital history, children's names, medical history, education and training, and work performance evaluations. This sort of information, should it come into the possession of the Commission, should not be publically disclosed.

Cal. Gov't. Code § 6254(c) explicitly exempts from disclosure, in response to records requests, "Personnel, medical, or similar files, the disclosure of which would

constitute an unwarranted invasion of personal privacy."[1] The Revised Draft Resolution states, "[the Commission has] long recognized our right to exercise discretion regarding our assertion of CPRA exemptions. D.05-04-030, which reviewed privacy issues related to G.O. 77 reports, stated that: "'Contrary to Applicants' apparent assumption, CPRA exemptions are permissive, rather than mandatory, and an agency may, but is not compelled to, assert the exemptions in a particular circumstance."[2] The Revised Draft Resolution explains that when the Commission performs the required balancing test and determines whether to disclose, or refrain from disclosing, personal information in safety-related records, a primary consideration will be whether disclosure will shed light on a utility's performance of its safety responsibilities.[3]

In comments on Draft Resolution L-436, SDG&E and SCG requested a blanket exemption on all utility employee information. DRA argued that there is no support for a blanket limitation on the disclosure of certain utility employee information, such as records regarding safety training and certification, and that any limitations should be imposed on a case by case basis.[4] The Revised Draft Resolution finds DRA's position is consistent with case law requiring adequate justification for the withholding of police officer information on the basis of perceived security concerns and with other decisions applying a balancing test to CPRA privacy exemptions.[5] The Revised Draft Resolution states, "where professional competence is at issue, courts may find that even significant employee privacy interests are outweighed by other considerations."[6]

CUE does not seek a blanket exemption on all utility employees' personnel information. However, the Resolution should recognize several distinct categories of information and utility employee classifications.. Information about the training and qualifications of utility employees is reasonably related to the Commission's oversight functions and the public's right to know whether utility service is safe and reliable, so long as that information ***excludes*** the names of non-management employees. That information can be disclosed. In contrast, (1) the names of non-management employees and (2) personnel records containing private information such as social security numbers, marital and medical history of any employee

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[1] CPRA § 6254(c).
[2] Revised Draft Resolution L-436, p. 57.
[3] *Id.* at p. 75.
[4] *Id.* at p. 74.
[5] *Id.* at pps. 74-75.
[6] *Id.* at p. 75.

should never be disclosed. Releasing either category of information will not serve the public interest and would be an unwarranted invasion of privacy.

In further support of its argument that utility employees' personal information does not qualify for a blanket exemption, the Revised Draft Resolution relies on *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 755.[7] This case finds that an ***elected board's*** personal information was appropriate for disclosure but that the public interest is not served in knowing the identities of students and other staff members involved in the dispute because ***these persons are not public officials.***[8] The court therefore redacted all names, home addresses, phone numbers and job titles before releasing the report.

The same reasoning applies with any reports stemming from utility safety training and certification or any other information involving non-management utility employees. Safety inquiries and the resulting data will not serve the public interest by including personal information about utility employees. Aggregating the training information of certain classes of employees to report in these types of inquiries would be appropriate for public disclosure. However, releasing any information of a non-management utility employee which might individually identify that employee would violate his identified privacy interest. Just as in the case relied upon in the Revised Draft L-436 cited above, the Commission should redact all names, addresses, phone numbers or any other personally identifiable information before releasing the reports. However, the identity of managers, directors, and those in other positions of authority should be subject to the balancing test, but utility employees' have a recognized privacy interest in their personnel files. Information regarding training and certification can be disclosed without including personal information of the utilities' employees.

The courts have long recognized that employees can expect reasonable expectation of privacy in their personnel files. The CPRA itself recognizes the right of privacy in one's personnel files by virtue of the exemption in section 6254. *Teamsters Local 856 v. Priceless, LLC* 112 Cal. App. 4th 1500, 1511-16, 5 Cal. Rptr. 3d 847, 855-58 (2003) examined this issue in depth.[9] That decision looked to the

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[7] *Id.* at pps. 74-75.
[8] *Id.* at p. 75.
[9] *Teamsters Local 856 v. Priceless, LLC*, 112 Cal. App. 4th 1500, 1511-16, 5 Cal. Rptr. 3d 847, 855-58 (2003).

Freedom of Information Act and subsequent federal cases for guidance in analyzing the CPRA.[10]

Those federal cases examined in the *Teamsters Local 856, supra* 112 Cal.App, 4th, case construing the similar federal provision have found a reasonable expectation of privacy in one's personnel files. "A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the recordkeeping activities of public employers and agencies. [Citations.]"[11] The United States Supreme Court has held that items to be protected within personnel files are not just the intimate private details of personal decisions.[12] The Court stated that the intent of Congress in enacting the exemption was that it: "... 'cover detailed Government records on an individual which can be identified as applying to that individual.' [Citation.] When the disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy."[13]

The Supreme Court has also stated that an individual's personnel file generally contains " 'vast amounts of personal data,'" including "where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance."[14] The Supreme Court has noted that access to personnel files is "drastically limited ... only to supervisory personnel directly involved with the individual...."[15] The federal courts recognize that information from a personnel file that applies to a specified individual raises significant privacy concerns. The California Supreme Court has recognized financial affairs as an aspect of the personal right to privacy: "In any event we are satisfied that the protection of one's

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[10] *Id;*, citing (*City of San Jose, supra,* 74 Cal.App.4th at p. 1016, 88 Cal.Rptr.2d 552.)[12]

[11] *Id* (*Detroit Edison Co. v. NLRB* (1979) 440 U.S. 301, 319, fn. 16, 99 S.Ct. 1123, 59 L.Ed.2d 333 [noting that federal Privacy Act bans unconsented disclosure of employee records].)

[12] *Id; United States Department of State v. Washington Post Co.* (1982) 456 U.S. 595, 102 S.Ct. 1957, 72 L.Ed.2d 358.

[13] *Id;* (*citing United States Department of State v. Washington Post Co. supra,* p. 602, 102 S.Ct. 1957.)

[14] *Id;* (*citing United States Department of State v. Washington Post Co. supra,* p. 602, 102 S.Ct. 1957.)

[15] *Id;*(*Department of the Air Force v. Rose* (1976) 425 U.S. 352, 369, 377, 96 S.Ct. 1592, 48 L.Ed.2d 11 [concerning records of air force cadets whose military education was publicly financed].)

personal financial affairs and those of his (or her) spouse and children against compulsory public disclosure is an aspect of the zone of privacy which is protected by the Fourth Amendment and which also falls within that penumbra of constitutional rights into which the government may not intrude absent a showing of compelling need and that the intrusion is not overly broad."[16] Ultimately, in the *Teamsters Local* case, the court accepted a stipulation that employees' salary details are kept confidential in personnel files.[17]

Similarly, the Commission should find that employees' personal information will be kept confidential. Any intrusion into employees' personal information based on a general inquiry is overly broad and would be an unwarranted invasion of privacy. The Commission may aggregate information and release it in a way that keeps employee identities private. After the San Bruno incident, the media showed up at the homes of PG&E field employees' and called them on home telephones seeking comments and stories. There is no public interest served in the ability to harass utility employees.

Therefore, the Commission should protect the privacy rights of California's utility employees and create an exemption for non-management utility employees' names and individually identifiable personnel information.

II. RESOLUTION L-436 SHOULD KEEP LABOR NEGOTIATIONS CONFIDENTIAL

Tens of thousands of utility employees are represented by labor unions. As would be expected, there are regular negotiations between utility management and union leadership regarding the multitude of issues that routinely arise in the workplace. These negotiations often settle disputes and modify collective bargaining agreements to avoid future disputes. Harmonious labor-management relations provide a great service to the public by allowing utility employees and management to focus on providing safe and reliable service without the distraction of unresolved workplace friction.

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[16] *Id;* (*City of Carmel by the Sea v. Young* (1970) 2 Cal.3d 259, 268, 85 Cal.Rptr. 1, 466 P.2d 225 [reviewing constitutionality of broad financial disclosure law applicable to public officers and employees].)

[17] *Id.*

These labor-management discussions are akin to typical settlement discussions which are not discoverable.[18] As such, any labor-management discussions should be kept confidential under the Commission's rules. Disclosing these negotiations will create a chilling effect and encouraging dispute resolution is always in the public's best interest. Therefore, the final Resolution L-436 should create an exemption for information or discussions between labor and utility management.

III. CONCLUSION

Final Resolution L-436 should create an exemption for any non-management utility employee's names and personally identifiable information. Additionally, Resolution L-436 should create an exemption for information or discussions between labor and utility management.

Sincerely,

Jamie L. Mauldin
Attorney for Coalition of California Utility Employees

JLM:clv

[18] Cal. Evid. Code § 1119 [communications during mediations are inadmissible]; Cal. Evid. Code §1152(a) [offers of compromise are inadmissible]; Fed. Evid. Code § 408.